Filed 2/25/09 In re R.H. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re R.H., a Person Coming Under the Juvenile Court Law.	B207929 (Los Angeles County Super. Ct. No. CK63828)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. I.F., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Affirmed.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Deborah L. Hale, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

I.F. (mother) appeals an order under Welfare and Institutions Code section 366.26, terminating her parental rights to her son, R.H., Jr. (R.H.).[1] Mother argues that the juvenile court erred in not applying the exception to termination codified in section 366.26, subdivision (c)(1)(B)(i) for parents who show that such termination would be detrimental to the child (Exception). We find overwhelming evidence supports the implied finding that mother failed to establish the applicability of the Exception. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Section 300 Petition*

On June 23, 2006, when R.H. was three years old, the Department of Children and Family Services (DCFS) filed a petition alleging that mother failed to protect R.H. as defined in section 300, subdivision (b). As subsequently submitted to and sustained, the petition alleged that R.H.'s physical and emotional health was endangered because: (1) mother had a history of substance abuse, used methamphetamine and was convicted of possession of a controlled substance; (2) a broken window and mechanical tools rendered R.H.'s home hazardous; (3) mother failed to obtain treatment by a physician when R.H. burned his leg with a curling iron; (4) mother lived with her parents and brother, who was a gang member and was shot at the home; and (5) father had been convicted of driving under the influence.[2]

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[1] Undesignated statutory citations are to the Welfare and Institutions Code.

[2] Father submitted to the petition. In January 2007, he indicated that he did not wish to "'fight for custody'" of R.H., and in May 2008, he consented to the termination of his parental rights. Father does not appeal.

2. *Detention and Placement with Paternal Grandparents*

On June 20, 2006, R.H. was detained and placed in the care and custody of his paternal grandfather and his grandfather's wife (collectively grandparents). R.H. appeared content with this placement. Throughout the dependency proceedings, DCFS consistently reported that R.H. was well adjusted and thrived in the care of his grandparents. R.H. had a strong bond with his grandparents; they provided him with stability and treated him well.

In January 2007, R.H.'s grandparents expressed an interest in adopting R.H. They sought to provide R.H. with a safe and happy childhood. R.H.'s grandparents' adoption homestudy was approved in April 2008.

3. *Mother's Efforts to Reunify*

On June 23, 2006, the juvenile court ordered DCFS to provide mother with reunification services. On August 2, 2006, mother was ordered to attend a drug rehabilitation program with random testing, parent education, individual counseling, and narcotics anonymous. Mother was ordered to have monitored visitation with R.H.

Mother enrolled in a drug rehabilitation program on October 16, 2006, but left the program on October 26, 2006. She enrolled in an outpatient drug treatment program on November 15, 2006, but was discharged May 8, 2007, due to tardiness and missed sessions. Mother was readmitted into the program June 25, 2007, but was discharged August 4, 2007. Mother entered another drug rehabilitation program on September 21, 2007, but was transferred due to a peer conflict and then discharged April 21, 2008. On April 21, 2008, mother was admitted into an inpatient drug treatment program. There was no evidence that mother completed this program.

Mother's drug tests were inconsistent. On July 13, 2006, October 11, 2006, December 29, 2006, January 3, 2007, April 26, 2007, and July 24, 2007 mother

tested positive for amphetamine and methamphetamine. On August 28, 2006, September 12, 2006, October 24, 2006, April 3, 2007, August 23, 2007, and August 25, 2007, mother failed to provide a specimen. Mother's remaining tests were negative.

The case plan called for mother to enroll in counseling. On November 15, 2006, mother enrolled in counseling. By August 2007, DCFS reported that mother was inconsistent in attendance and her progress was minimal. Mother's counselor reported in July 2007 that mother was "not working on her drug program" and exhibited an "inability to deal with drug issues . . . ." The counselor further reported: "I do no[t] see stability in her life, which precludes her from developing a healthy living environment for her and her son."

Mother's visits never progressed from monitored to unmonitored. Throughout the reunification period, mother consistently visited R.H. and engaged in appropriate activities such as completing puzzles. In August 2006, DCFS reported that when mother called R.H., he cried and said that he wanted to go home. In August 2007, DCFS reported that there was a positive bond between R.H. and mother. No further description of the bond was provided. In January 2008, DCFS reported that R.H. on several occasions wanted to end his visitation with mother and "go home." In May 2008, mother's visits increased in duration to four hours, and maternal grandparents were given unmonitored visits. Around the same time, R.H.'s behavior regressed.

On September 26, 2007, the court terminated mother's reunification services. The court found that mother had not made sufficient progress toward alleviating the problems that led to the removal of R.H. or demonstrated that she could provide for R.H.'s safety and emotional health.

4. *Section 366.26 Hearing*

On May 13, 2008, a hearing was held pursuant to section 366.26 to determine R.H.'s permanent plan (section 366.26 hearing). At the hearing, mother submitted a letter asking for one more opportunity. Her counsel argued that mother satisfied the requirements of the Exception because she maintained regular visitation and contact with R.H. and because R.H. would benefit from continuing the relationship with mother. Counsel stated that R.H. was always glad to see mother, who parented him until the age of three. Other than counsel's argument and mother's letter, no evidence was presented specifically describing mother's bond with R.H. or identifying any detriment R.H. would suffer from the severance of their relationship.

R.H.'s counsel argued that the case was "not even close" and recommended adoption as R.H.'s permanent plan.

5. *Termination of Mother's Parental Rights*

After hearing argument, the court terminated parental rights. The court did not expressly refer to mother's argument that the Exception was applicable, but it was the only issue raised at the section 366.26 hearing. Mother timely appealed from the termination of her parental rights.

DISCUSSION

After the reunification period is terminated, a parent's interest in the care, custody, and companionship of the child is no longer paramount. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) At a section 366.26 hearing, the juvenile court must select between adoption, guardianship, or long-term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.) The Legislature has expressed a preference for the adoption of children who are dependants of the juvenile court and are not reunified with their parents. (§ 366.26, subds. (b)(1) & (c)(1).) If a court finds a

child adoptable, it must terminate parental rights at a section 366.26 hearing absent a relevant exception. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416.)

Mother relied solely on the Exception, which provides: the juvenile court may order guardianship or long-term foster care if it "finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (C)(1)(B).)[3] Mother argues that the juvenile court failed to determine whether the Exception was applicable and that this court may not imply that finding. In the alternative, she argues that if the finding is implied, it is not supported by substantial evidence.

1. *This Court May Imply the Finding that the Juvenile Court Rejected the Exception*

Better practice would have been for the juvenile court to state expressly that the Exception was inapplicable. (See *In re Corienna G.* (1989) 213 Cal.App.3d 73, 83; § 366.26, subd. (b) [trial court "shall make findings and orders"].) Respondent does not argue otherwise. However, we may imply the finding that the trial court rejected the Exception.

Generally higher courts may imply findings necessary to sustain a judgment. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 793 [implying finding that awarding custody to father would not be detrimental to a child], superseded on another ground by statute as stated in *In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 [discussing generally the doctrine of implied findings].) More specifically, an appellate court may imply the finding that the Exception is inapplicable. (*In re*

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[3] Prior to January 1, 2008, the exception found in section 366.26, subdivision (c)(1)(B)(i) was found in section 366.26, subdivision (c)(1)(A).

Andrea R. (1999) 75 Cal.App.4th 1093, 1109.) In *In re Andrea R.*, the court implied a finding that the Exception was inapplicable based on the following facts: "neither parent had visited Andrea regularly during the past six years of her life, neither had progressed beyond monitored visits, neither played a meaningful and significant parental role, and the most recent visits and telephone calls with appellants had left Andrea confused, upset, and so anxiety-ridden that she lost control of her bodily functions." (*Id.* at p. 1109.)

Mother's reliance on *In re Marquis D.* (1995) 38 Cal.App.4th 1813 and *In re V.F.* (2007) 157 Cal.App.4th 962 is misplaced. Both cases involved the application of section 361.2, subdivision (a), which requires a court to place a dependent child with a noncustodial parent who desires custody *unless* the court finds such placement would be detrimental to the child. In *In re Marquis D.*, the appellate court was unable to determine whether the juvenile court "even considered the [applicable] statutory provision" and concluded the record did not present the "clear-cut case in which an appellate court may imply such a finding." (*Marquis D.*, at pp. 1825-1827.) Similarly, in *In re V.F.*, the same court found the trial court had not considered the correct code provision and, accordingly, declined to imply findings.

Neither *In re Marquis D.* nor *In re V.F.* precludes us from implying the finding that the juvenile court rejected the Exception. Mother had the burden to show the applicability of the Exception. This was the only issue raised at the section 366.26 hearing. In terminating mother's parental rights, the court necessarily rejected her argument that the Exception applied. Moreover, assuming an appellate court may imply a finding only in a "clear-cut" case, as explained below, the evidence in this case overwhelmingly supported the trial court's conclusion.

2. *The Implied Finding Is Supported By Overwhelming Evidence*

To fall within the Exception, a parent must show the parent-child relationship is "sufficiently strong that the child would suffer detriment from its termination." (*In re Beatrice M., supra*, 29 Cal.App.4th at p. 1418.) "The exception may apply if the child has a 'substantial, positive emotional attachment' to the parent." (*In re S.B., supra,* 164 Cal.App.4th at p. 299.)

The benefit the child would receive is not considered in isolation, but the natural parent-child relationship must "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The parent is not required to show that the child has a primary attachment to the parent or that the parent has maintained day-to-day contact. (*In re S.B., supra*, 164 Cal.App.4th at p. 299.) However, "[i]nteraction between [a] natural parent and child will always confer some incidental benefit to the child. . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) Factors to consider include "(1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Angel B.* (2002)

97 Cal.App.4th 454, 467, fn. omitted.) There must be evidence a child would suffer detriment from the termination of the parent-child relationship. (*Ibid.*)

At this late stage in the dependency proceedings, the parent carries the burden to show that the termination of parental rights would be detrimental to the child. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.) DCFS is not required to present evidence showing the child would not benefit from parental contact. (*In re Angel B., supra,* 97 Cal.App.4th at p. 466.)

Mother failed to present any evidence that R.H. would suffer detriment from the termination of her parental rights. Although mother consistently visited R.H., there was no evidence that R.H. would be harmed if these visits ended. This alone is sufficient to support the termination of parental rights. (*In re Angel B., supra*, 97 Cal.App.4th at p. 468.) The absence of any evidence of detriment distinguishes this case from *In re Amber M.* (2002) 103 Cal.App.4th 681, 689, where a bonding study showed that it would be detrimental to sever the mother's relationship with her child.

Although there was evidence that at the beginning of the proceedings, R.H. did not want his visits with mother to end, there is no evidence that at the time of the section 366.26 hearing mother had a significant positive attachment with R.H. By that time, R.H. wanted the visits to end. There is no evidence that R.H. "derived comfort, affection, love, stimulation, [or] guidance" from mother. (*In re S.B., supra,* 164 Cal.App.4th 289 at p. 300.)

Mother concedes she is unable to provide full-time care for R.H. and that throughout the reunification period her visits never progressed to unmonitored ones. Mother also acknowledges that she never completed a drug treatment program as required by her case plan. At the time of the section 366.26 hearing, R.H. had been removed from her care for almost two years. R.H. was thriving in the care of his grandparents, who offered him continuing stability. R.H.'s

grandparents already had an approved homestudy. When mother's care is considered in conjunction with that offered by R.H.'s grandparents, there is no evidence that maintaining the parent-child relationship would "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) The evidence overwhelmingly supported the termination of mother's parental rights. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.)

DISPOSITION

The order terminating mother's parental rights is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.